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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In re Matter of | ) | |
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| Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |
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# COMMENTS OF DUQUESNE LIGHT COMPANY

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Duquesne Light Company
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## SUMMARY

Duquesne Light Company is an electric utility engaged in the production, transmission, distribution, and sale of electric energy. Its service territory is approximately 800 square miles in southwestern Pennsylvania, including Pittsburgh, with a population of over 1.5 million. Duquesne owns many thousands of distribution poles and controls numerous ducts, conduits, and rights-of-way, all of which are part of its core infrastructure by which it provides electric service. Duquesne accordingly has a vital interest in the outcome of this proceeding.

The electric power industry is the primary engine that drives every aspect of the U.S. economy. It is heavily regulated by both Federal and state agencies. Electric utility companies were formerly regulated monopolies in defined service territories. Federal and state regulatory structures are changing rapidly to allow competition and to require access to transmission and distribution facilities. In the midst of this regulatory turmoil, it is prudent for the Commission to continue to exercise its discretion to decline to adopt any substantive rules which could affect the transmission and distribution networks of the electric power industry. First, neither Section 224 nor Section 251 requires the Commission to adopt regulations specifically governing the mandatory access provisions of Section 224(f)(1). Second, neither the Commission nor the Commission Staff has the experience necessary to regulate substantive aspects of the electric power industry. Third, the Commission cannot foresee the myriad factual circumstances in which access to poles, ducts, conduits and rights-of-way would be raised. Accordingly, the Commission should follow its own precedent and Supreme Court's guidance in Chenery II and rely upon its well-developed common carrier nondiscrimination jurisprudence to adjudicate pole attachment

access disputes. Rigid rules are inadvisable at this early stage of regulation of the electric utility industry.

If the FCC determines to adopt specific rules or policies, Duquesne offers the following comments in response to the NPRM's questions:

1. Affiliates of facility owners should be afforded access on the same terms as third-party telecommunications carriers, but encumbering access of owners to their own facilities is contrary to the public interest.

2. In considering access to facilities by telecommunications carriers, the Commission should take into account existing available capacity (whether it be wire or wireless) already attached to the utility's system and whether there is need for additional capacity.

3. The Commission should defer to state regulation and local zoning ordinances in considering access to facilities and ensure that the attaching parties are responsible for all related fees and all other costs associated with modifying the use of existing facilities for the benefit of an attaching party.

4. The Commission must preserve third-party property rights in considering access to facilities, where the facilities are located on property to which the electric utility has an easement or license.

5. The maximum number of possible attachments to poles, and the capacity of ducts, conduits, and rights-of-way, should be determined on an engineering basis by reference to applicable engineering codes, and the electric utility must be able to reserve capacity for its own projected expansion needs.

6. Excess capacity on electric utility facilities should be allocated on a first-come, first-served basis, with restrictions on warehousing capacity by a telecommunications carrier to impede competition.

7. Electric utilities should have wide latitude to determine what constitutes valid safety, reliability, or generally-applicable engineering purposes under Section 224(f)(2). Electric utilities should bear the burden of proof but their engineering analyses should be considered a rebuttable presumption.

8. The Commission should require compliance with the National Electrical Safety Code and structural integrity requirements.

9. Notice to attaching entities by an electric utility of intention to modify a facility should be given by first class mail, postage prepaid, ten days in advance. The Commission should establish a five-year grace period for validation of pole attachment databases.

10. Telecommunication carriers should be prohibited from making any attachments without first obtaining the facility owner's concurrence.

11. Make-ready costs should be shared by the number of attaching entities that elect to add to or to modify their attachments; they should not be offset by potential revenue increases; the Commission should not restrict the facility owner's right to modify its facilities.

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## COMMENTS OF DUQUESNE LIGHT COMPANY

Duquesne Light Company ("Duquesne"), by its attorneys and pursuant to Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (1994) and the Commission's Notice of Proposed Rulemaking (the "NPRM") in the above-captioned docket adopted April 19, 1996, hereby submits its Comments. Duquesne's comments are directed towards and limited to the Commission's inquiries regarding pole attachments in the NPRM, ¶¶ 220-225, as those rules would apply to electric utility companies. The NPRM is intended to implement the local exchange telephone company ("LEC") interconnection requirements in new Section 251 of the Communications Act of 1934 (the "1934 Act"), added by Section 101 of the Telecommunications Act of 1996 (the "1996 Act"). Section 251(b)(4) imposes upon a LEC the "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224." A small portion of the NPRM (¶¶ 220-225) relates to implementation of Section 224 as it relates to pole attachments. This section apparently would be applicable to electric utilities as well as LECs.

## I. Introduction

Duquesne Light Company is an electric utility engaged in the production, transmission, distribution, and sale of electric energy. Its service territory is approximately 800 square miles in southwestern Pennsylvania, including Pittsburgh, with a population of over 1.5 million. In addition to serving more than 580,000 retail customers, the company sells electricity at wholesale to other utilities. Duquesne is a forward-thinking electric utility which has introduced one of the first comprehensive customer service guarantee programs in the nation. Duquesne owns many thousands of distribution poles and controls numerous ducts, conduits, and rights-of-way, all of which are part of its core infrastructure by which it provides electric service. Duquesne accordingly has a vital interest in the outcome of this proceeding.

The Commission indicated that it would address only the issues raised under Section 224(f) and Section 224(h) in the context of the interconnection requirements of Section 251(b)(4). NPRM ¶ 221. The Commission requested comments on specific questions relating to three broad issues: (1) "nondiscriminatory access[,]"[1/] which will be addressed in Part II below; (2) denial of access for want of capacity or "for reasons of safety, reliability, and generally applicable engineering purposes[,]"[2/] which will be addressed in Part III below; and (3) issues relating to modification of a pole, duct, conduit, or right-of-way,[3/] which will be addressed in Part IV below.

1/ The 1934 Act § 224(f)(1).

2/ Id. § 224(f)(2).

3/ See Id. § 224(h).

## II. THE COMMISSION SHOULD ADOPT RULES RELATING ONLY TO RATES AND PROCEDURE UNTIL IT HAS GAINED KNOWLEDGE AND EXPERIENCE IN REGULATING THE ELECTRIC POWER INDUSTRY

In this rulemaking and the more comprehensive pole attachment rulemaking to follow, the Commission should act cautiously. First, the Commission must bear in mind that the electric power industry is the primary engine that drives every aspect of the U.S. economy.[4/] In 1994 alone, over $200 billion of electricity was consumed in the United States.[5/] Industrial and commercial firms consume about two thirds of all electricity in the United States.[6/] Reliable electric service is vital to the success of every business activity and every commercial establishment in America. Without electricity, the gross domestic product would evaporate. A widespread power loss of only fifteen minutes during business hours translates into millions of dollars of lost productivity.

Second, the Commission must recognize its own inexperience in regulating any substantive aspect of the electric power industry. While the FCC has regulated pole attachment rates for many years, regulating rates is fundamentally different than substantive regulation affecting the reliability of electric service to the public. Neither the Commission nor its staff have yet developed the knowledge and experience to adopt substantive regulations that will affect technical aspects of the electric power industry. Moreover, the Commission should recognize that the fundamental changes now occurring or being considered with regard to the basic structure of the

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[4/] Energy Information Admin., U.S. Dep't. of Energy, Energy Information Sheets 33 (1995).

[5/] Energy Information Admin., U.S. Dep't. of Energy, Annual Energy Review 1994 229, 249 (1995).

[6/] Id. at 239.

electric utility industry require both the Commission and the electric utilities to maintain some regulatory flexibility for the immediate future. Neither can the Commission nor its staff amass this knowledge and experience on the accelerated timetable mandated by the 1996 Act for adopting final interconnection rules.

Third, neither Section 224 nor Section 251 requires the Commission to adopt regulations specifically governing the mandatory access provisions of Section 224(f)(1).

For these reasons, the Commission initially should proceed by adjudication rather than rulemaking in deciding technical issues that could affect reliability of the nation's electric power industry.

### A. The Commission Should Rely Upon Its Well-Developed Common Carrier Nondiscrimination Jurisprudence to Adjudicate Pole Attachment Access Disputes

In the NPRM, the Commission seeks comments regarding the meaning of "nondiscriminatory access" as that term is used in Section 224(f)[7] of the 1934 Act, as amended by Section 703 of the 1996 Act.[8]

[7] Section 224(f) provides:
(1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.
(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

[8] Specific questions include: "[T]o what extent must a LEC provide access to poles, ducts, conduits, and rights-of-way on similar terms to all requesting telecommunications carriers? Must those terms be the same as the carrier applies to itself or an affiliate for similar uses? Are there any legitimate bases for distinguishing conditions of access?" NPRM ¶ 222.

In the more than fifty years since initial enactment of Title II of the 1934 Act, the Commission on numerous occasions has determined the meaning of the term "nondiscriminatory" in the context of its common carrier jurisdiction.[9/] This well-developed body of law, as well as the similar bodies of law developed by agencies such as the Interstate Commerce Commission with respect to interstate railroads and motor carriers, and the Federal Energy Regulatory Commission with respect to pipelines, is readily and appropriately applied in the context of pole attachments.[10/] The Commission need make only the obvious adjustments necessary with respect to the factual distinctions. Under the circumstances, the most prudent course for the Commission is to exercise its discretion under Chenery II[11/] and to decline to issue a comprehensive set of rules with regard to the meaning of the term "nondiscriminatory access" in Section 224(f) at this time. Rather, the Commission should for the present resolve any disputes by adjudication. It is worthy

9/ See, e.g., Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, 8 F.C.C. Rcd. 4478, 4482 (1993) (holding LECs must provide nondiscriminatory access to billing name and address data to IXCs); Cellular Telephone Co., 3 F.C.C. Rcd. 6274, 6275 (1988) (holding resale prohibitions are unreasonably discriminatory); In re Lincoln Telephone and Telegraph's Duty to Furnish Interconnection Facilities, 72 F.C.C. 2d 724 (1979) (holding an independent phone company must interconnect with MCI); In re Warrensburg Cable, Inc., 48 F.C.C.2d 893, 896 (Rev. Bd. 1974) (holding a LEC unreasonably discriminated against a CATV system in denying access to its poles)
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10/ In fact, the Commission used its common carrier jurisdiction to require cable television access to LEC poles long before Section 224 was enacted. See In re Warrenburg Cable, 48 F.C.C.2d 893, 896 (Rev. Bd. 1974).

11/ Securities and Exchange Commission v. Chenery, 332 U.S. 194 (1947) ("Chenery II"). Chenery II holds that in the absence of a statutory mandate, the choice between rulemaking and adjudication lies solely in an agency's informed discretion. Id. at 203. Section 224(e)(1) requires that the Commission adopt regulations only to "govern the charges for pole attachments used by telecommunications carriers[.]"

of note that when the Commission in 1978 first assumed jurisdiction over pole attachments, it initially declined to adopt any substantive rules relating to the reasonableness of non-price terms of pole attachment agreements because it had no experience regulating electric utilities.[12/]

The Supreme Court opined in Chenery II that an agency may exercise its "informed discretion" to proceed by adjudication rather than by rulemaking where it "may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule."[13/] Chenery II is particularly apropos in this instance. This Commission has very little experience with the electric utility industry and can not be expected to be aware of the vital factors affecting this industry. The Commission Staff has impressive technical expertise with respect to the design, engineering, and use of RF devices, computers, and wired telecommunications networks. However talented the Staff may be in regard to telecommunications, the Staff does not possess similar expertise with respect to power engineering of high voltage electric transmission and distribution networks. The Staff will be unable to amass sufficient expertise to enable it to promulgate well-reasoned technical regulations within the six-month statutory deadline for adopting rules implementing Section 251.

The Commission has for many years regulated the rates for pole attachments. However, this experience is not germane. The engineering and public policy considerations concerning

12/ See Adoption of Rules For The Regulation of Cable Television Role Attachments, First Report and Order, 68 F/C/C/ 2d 1585, 1590 (1978); Adoption of Rules For The Regulation of Cable Television Pole Attachments, Second Report and Order, 72 F.C.C. 2d 59, 74-75 (1979).

13/ Chenery II, 332 US at 203.

access to utility property are altogether different than economic factors affecting the rates to be charged for such access. Until the recent amendments enacted by the 1996 Act, the FCC did not have jurisdiction to regulate access to electric utility property. Indeed, as the Supreme Court stated in 1987, nothing in the original Section 224 gave cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators."[14/] For the first time, the FCC now must regulate access to electric utility property.

Furthermore, the Commission cannot foresee the myriad of factual circumstances in which its rule would apply. There are tens of millions of distribution poles in use throughout the United States. They are located in cities; in rural areas; in areas in which the critical structural factors may be ice load, wind load, or violent storms; in near rain-forest conditions and in desert conditions; in soil types ranging from swampland to clay to rocks. Distribution poles support an incredible variety of power distribution equipment. Duquesne itself, which has a relatively compact service territory in comparison to some utilities, has over 234,000 poles presently in service. Every mandatory access complaint the Commission adjudicates will involve unique factual circumstances which the Commission cannot possibly, much less reasonably, foresee. Moreover, ducts, conduits, and rights-of-way present different technical considerations than distribution poles. In this regard, the Supreme Court has recognized that an agency's inability to foresee problems is a valid reason for an agency to proceed by adjudication rather than by rulemaking.[15/]

[14/] Federal Communications Comm'n v. Florida Power Corp., 480 U.S. 245, 251 (1987).

[15/] Chenery II, 332 U.S. at 203.

In the context of our position disfavoring rulemaking on the meaning of the term "nondiscriminatory access," we address the Commission's specific requests for comments in the remainder of this section.

### B. Affiliates of Facilities Owners Should Be Afforded Access on the Same Terms as Third-Party Telecommunications Carriers, But Encumbering Access of Owners To Their Own Facilities Is Contrary to the Public Interest

The Commission specifically requested comments regarding whether "terms [of access for third-party carriers must] be the same as the carrier applies to itself or an affiliate for similar uses."[16/]

Public utilities are presently considering providing telecommunications services to the public. Congress clearly considers that it is in the public interest for them to do so, as evidenced by Section 103 of the 1996 Act, which permits holding companies registered under Section 5 of PUHCA[17/] to provide telecommunications services to the public so long as they do so through a subsidiary which has been granted Exempt Telecommunications Company ("ETC") status by this Commission. Neither PUHCA nor the 1996 Act limits by law an exempt holding company (or a stand-alone electric utility company) to offering telecommunications services only through an affiliated company. However, the realities of state and federal rate regulation and public utility accounting dictate that a separate telecommunications affiliate may be the only practical means for a public utility to offer such services. The 1996 Act permits both federal and state regulatory

[16/] NPRM ¶ 222.

[17/] Public Utility Holding Company Act of 1935 § 5, 15 U.S.C. § 79e (1994) ("PUHCA").

agencies to continue to monitor affiliate transactions within a holding company system, notwithstanding grant of ETC status to a telecommunications subsidiary.[18/]

It would be inappropriate for telecommunications affiliates of electric utilities to be able to gain a competitive advantage over independent telecommunications carriers due to preferential terms or conditions of access to the poles, ducts, conduits and rights-of-way of their affiliated electric utilities. In fact, some states have enacted statutes prohibiting a utility (without regard to whether it is part of an exempt or registered holding company system) from granting preferential treatment to affiliates and requiring all affiliate transactions to be filed with and approved by the appropriate state commission.[19/]

However, the Commission also requested comment as to whether the owner (i.e., the electric utility itself) of the pole should be precluded from attaching its own equipment except under the identical (or similar) terms as those offered to telecommunications carriers.[20/] A rule limiting the right of a public utility to make utility attachments to its own poles would be untenable. It would infringe on the property interests of the facility owner and could interfere with the utility's obligation to provide electric service to the public.

Moreover, the reasons underlying common terms and conditions demonstrate that they are unnecessary with respect to the electric utility itself. For instance, terms and conditions that

[18/] Telecommunications Act of 1996 § 103 (adding PUHCA § 34(e)).

[19/] See, e.g., Wis. Stat. Ann. § 196.52 (West 1992); 66 Pa. C.S.A. § 2101, et seq.

[20/] "Must those terms [for access to poles, ducts, conduits, and rights-of-way] be the same as the carrier applies to itself or an affiliate for similar uses?" NPRM ¶ 222 (emphasis added).

might be applied to a telecommunications carrier may involve identification of the telecommunications equipment to be attached to a pole. This information enables the pole owner to do a structural analysis to ensure that the pole can support the projected load, especially for wireless antennae. This may include an analysis of equipment with which the electric utility engineers are unfamiliar, and time must be provided to permit that analysis to be accurately completed. On the other hand, the types and amounts of structural loads of power utility material is well known to electric utility engineers, with the pole itself having been selected in order to support this utility equipment. Another condition that might be applied to a telecommunications carrier is to require its work in ducts containing energized high voltage circuits to be performed by utility personnel for safety reasons. Other terms and conditions might be applied to telecommunications carriers to enable the electric utility to ascertain that sufficient usable space is available on particular poles for a desired telecommunications attachment. This analysis would not be needed for the attachments of the electric utility itself because the National Electrical Safety Code reserves the top several feet above the neutral zone for electrical attachments.

With respect to telecommunications carriers, the electric utility must know attachment information well before the desired effective date in order to coordinate these attachments. Usable space in the telecommunications section of distribution poles may be at a premium, particularly as additional telecommunications carriers begin competing with incumbent LECs and cable television systems. Wireless carriers may desire attachments of heavy antenna arrays potentially affecting structural integrity. Moreover, the utility must require the telecommunications carrier to

provide specific information regarding the location, equipment types, and so forth, regarding each attachment in order to maintain an accurate database of attachments.[21/]

As the above discussion demonstrates, different needs and concerns regarding telecommunications attachments will require some legitimate procedural terms and conditions that are unneeded with respect to the pole owner. The Commission should recognize this and not adopt regulations limiting the ability of pole owners to make attachments to their own poles.

### C. The Commission Should Consider State Regulations in Mandating Access to Poles, Ducts, Conduits, and Rights-of-Way

The Commission specifically requested comment regarding whether there are "any legitimate bases for distinguishing conditions of access." NPRM ¶ 222.

Conditions of access should be distinguished on the basis of state regulations and local zoning ordinances. First, electric utilities are subject to state and local regulation wholly apart from the pole attachment provisions in Section 224. Such regulations (particularly health and safety regulations) are not preempted by Section 224. As an example, the Wisconsin Department of Industry, Labor & Human Relations has adopted regulations which prohibit mounting the outdoor portion of certain radio antennae on poles used for electric power or communications lines.[22/] Moreover, state agencies may have adopted specific structural design guidelines which

[21/] Under Section 224(h) as amended by the 1996 Act, the accuracy of this database is very important. New Section 224(h) requires facilities owners to provide written notice of intended facilities modifications to all attaching entities. Database integrity is a serious problem facing all pole owners because cable television operators, and private telecommunications operators, have frequently made attachments without even informing the utility.

[22/] See Wis. Admin. Code §§ ILHR 62.35, 62.40 (Dec. 1995)

may be more restrictive than otherwise applicable engineering codes in order to meet local conditions.[23/] Such state regulations would clearly be at odds with a rule, if the Commission were to adopt one, that arbitrarily mandates absolute access by all telecommunications carriers to distribution poles and could potentially expose an electric utility to state liability for compliance with the FCC regulations, and vice-versa.

Second, certain attachments could violate applicable local zoning restrictions. For instance, a wireless antenna mounted on a distribution pole may exceed the maximum permissible height. Similarly, zoning ordinances may prohibit the ground location of radio transmission equipment in rights-of-way, even if the antenna itself might otherwise be permitted. The Commission's access rules clearly should state that they do not preempt local zoning ordinances and that access is subject to compliance with them. Moreover, the Commission should require that if zoning action is necessary, the entity requesting attachments, and not the owner of the pole, is required to submit and prosecute in its own name any required zoning applications, building permit applications, and other applications to local authorities. Further, the Commission should require the attaching entity to coordinate such applications with the owner of the pole prior to submission. The Commission should also require that the entity desiring attachments, and not the owner of the pole, must pay all zoning or other application fees, counsel fees, and all other costs associated with such applications (including the full cost -- wages/benefits/out-of-pocket

[23/] See Wis. Admin. Code § ILHR 62.37 (Dec. 1995) (prescribing ice and wind loading design criteria).

expenses -- of electric utility employees for actual time spent on zoning activities on the attaching party's behalf).

### D. The Commission Must Preserve Third-Party Property Rights In Its Nondiscriminatory Mandatory Access Rule

A further basis for distinguishing terms of access lies in third-party property rights. A large proportion of the rights-of-way used by electric utilities is not owned in fee but is used pursuant to an easement or other paid license granted by the fee owner of the underlying real estate. Easements granted in recent years might be broad enough to permit the pole owner to make any attachments sought by telecommunications carriers. However, earlier easements were typically drafted to permit only the running of electrical wires, or perhaps, electrical and telephone wires. Such restrictive easements would not permit the attachment of radio antennae for wireless carriers, and may not encompass the attachment of various telecommunications equipment which other carriers might require, particularly as technology develops in the future.

In prescribing nondiscriminatory mandatory access rules, the Commission must preserve third-party property rights. If the Commission were to adopt a rule granting all telecommunication carriers and cable television companies absolute access to poles, ducts, conduits and rights-of-way, landowners might successfully prosecute an action for damages against the United States under a Loretto takings theory.[24/] Moreover, the Commission must consider whether it even has

[24/] See Loretto v. Tele-Prompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (holding that "a permanent physical occupation authorized by a government is a taking without regard to the public interest it may serve"). The FCC would be authorizing telecommunications carriers permanently to occupy a land owner's property by making an attachment beyond the scope of an existing easement.

statutory authority to adopt a mandatory access rule. The U.S. Court of Appeals for the D.C. Circuit has recently stated that the general provisions of the 1934 Act, do not grant the FCC authority to effect a taking, absent specific Congressional intent to grant such power.[25/] No such intent is evident on the face of Section 224 or in its legislative history. Indeed, Congress seems not even to have considered takings issues, and certainly expressed no specific legislative intent to grant the FCC such power in the context of pole attachments.

If additional easements are required under state law, the Commission should require that the utility facilities owners, not the telecommunications carrier or cable television operator seeking an attachment, negotiate with the fee owner of the land for the purpose of obtaining an appropriate easement in the utility's own name. Attempted negotiations of easements by multiple entities all relating to the same physical facility (pole, duct, etc.) could confuse property owners, and result in inconsistent and possibly conflicting easements. The entity seeking an attachment should be responsible for all additional easement fees and for transaction costs (including the full cost -- wages/benefits/out-of-pocket expenses -- of electric utility employees for actual time spent in researching whether additional easements would be required, identifying landowners, or other easement-related activity voluntarily undertaken at the carrier's request). The FCC's rule must also recognize that some easement negotiations are doomed to fail for a variety of reasons, and not require the utility owner to permit attachments in those instances.

Finally, the FCC must not attempt to order an electric utility to exercise the power of eminent domain to condemn property (in easement or in fee) solely for the purpose of providing

[25/] Bell Atlantic Companies v. FCC, 24 F.2d 1441, 1447 (D.C. Cir. 1994).

attachments. First, a utility's exercise of eminent domain involves the expenditure of significant political capital, and is invariably accompanied by adverse publicity, complaints to state commissions, and voter pressure on local elected officials. Unless no other alternative exists, most utilities are therefore very reluctant to condemn private property, even for their own electric business. Second, state law in most instances limits a utility's power of eminent domain to instances in which property is required to provide electrical service[26/] (and not for the purpose of enabling a third party to provide telecommunications services). For these reasons, the Commission should not require electric utilities to attempt to condemn property if landowners will not agree to additional easements. If Congress had intended to grant the power of eminent domain to telecommunications carriers, it would have done so explicitly; the FCC should not attempt to do so by requiring electric utilities to exercise the power of eminent domain on behalf of telecommunications carriers.

## III. COMMENTS RELATING TO CAPACITY CONSTRAINTS, DENIAL OF ACCESS FOR SAFETY, RELIABILITY, AND GENERALLY-APPLICABLE ENGINEERING PURPOSES

### A. "Capacity" Should Be Determined On An Engineering Basis, With The Facility Owner Being Permitted To Reserve Reasonable Expansion Capacity

The Commission seeks comments on "specific standards under section 224(f)(2) for determining when a utility has 'insufficient capacity' to permit access."[27/]

[26/] See, e.g., Fla. Stat. Ann. § 361.01 (West 1968); Ga. Code Ann. § 22-3-20 (Michie 1982); N.H. Rev. Stat. Ann. § 371:1 (1995 Repl. Vol); N.M. Stat. Ann. § 62-1-4 (1993 Repl. Pamphlet); Va. Code Ann. § 56-49 (1995 Repl. Vol.) (all limiting utility exercise of the power of eminent domain to circumstances in which property is required for the purpose of providing electric service).

[27/] NPRM ¶ 223.

The maximum number of possible attachments should generally be determined on an engineering basis by reference to applicable engineering codes. For instance, the number of permissible attachments on a pole of a given height can readily be determined by reference to the National Electrical Safety Code. The capacity of ducts, conduits, and rights-of-way may similarly be calculated.

A more significant question involves the extent to which an electric utility should be able to reserve capacity for its own use. In the first instance, the Commission should distinguish between the utility itself and its telecommunications affiliates. As noted above in Part II.B, a utility's telecommunications affiliates should be treated the same as third-party telecommunications carriers. This equivalent, nondiscriminatory treatment should encompass the ability to reserve capacity, in addition to other terms and conditions.

The electric utility itself, however, must have greater rights. A utility's decision as to the sizing of poles, conduits, ducts, or rights-of-way is made by determining its present and future needs for its electric power business. State commissions will not permit deliberate overconstruction of facilities (such as speculative construction for potential attachment revenue) to be recovered in a utility's rates, and are not at all hesitant to disallow such costs.[28/] Until the 1996 Act, the utility could be confident that the reserve capacity thus designed into its system would be secure, because the decision whether to rent attachment space was in the sole discretion of the utility.[29/]

[28/] See, e.g., Re Southern California Gas Co., 135 P.U.R. 4th 329, 358-59 (Cal. P.U.C. 1992) (disallowing costs of an overengineered headquarters building).

[29/] See Federal Communications Comm'n v. Florida Power Corp., 480 U.S. 245, 251 (1987).

The 1996 Act, however, changes this paradigm, mandating access to third parties. In the context of distribution poles, the threat to future electric utility needs may be minimal, because distribution poles must be some minimal height (about 40 feet) for safety purposes, which in most cases will be sufficient to support several attachments. In the context of existing underground ducts and conduits, which are extremely expensive to install, the threat to future utility requirements may be acute unless the conduit or duct owner is permitted to reserve capacity.

The Commission must permit electric utilities to retain reasonable reserve capacity to support future needs, particularly in light of Section 224(i) (which precludes a utility from requiring attaching entities to pay for rearrangements of their attachments if the utility in the future must increase the capacity of its facilities for its own purposes). It would be an extreme and inequitable result if a situation were to arise where an electric utility's reserve was eliminated by telecommunications attachments, and the electric utility was later required under Section 224(i) to pay for rearrangement of those unwanted attachments when its forecast reserve needs materialized.

In order to preclude this unjust result, the FCC must permit electric utilities to maintain prudent reserve capacity. The amount of such reserve should not be determined as an absolute limit (e.g., 30%), because the need for such reserve will vary depending upon the situation. In an area in which significant building is taking place (e.g., on the outskirts of a rapidly expanding metropolitan area), a larger reserve is appropriate than in an urban area that has already been developed. The FCC should therefore determine the allowable reserve on a case-by-case basis, giving significant deference to the utility's past planning practices.

### B. Capacity Should Be Allocated On a First-Come, First-Served Basis, Allowing Reasonable Reserve Capacity For the Facility Owner

The Commission seeks comments on whether it has the authority to establish regulations directing capacity allocation schemes, and, if so, whether it ought to do so.[30/]

The U.S. Court of Appeals for the D.C. Circuit recently addressed the scope of the Commission's rulemaking power in Mobile Communications Corporation of America v. FCC.[31/] A narrowband PCS licensee had been awarded a pioneer's preference license before Congress granted FCC auction authority. The licensee appealed the Commission's later imposition of a substantial license fee on the theory inter alia that the FCC lacked statutory authority to impose an auction-based fee far in excess of administrative processing costs.[32/] Describing Section 4(i) of the 1934 Act as the "necessary and proper clause."[33/] the D.C. Circuit held that it provides the Commission sufficient authority to impose auction-based fees on pioneer's preference licensees, even though Section 309(j), granting auction authority, is silent on the issue.[34/] In this situation, Section 224 is silent as to the Commission's authority to establish rules requiring fair and reasonable allocation of capacity, but, as in Mobile Communications, Section 4(i) provides the requisite statutory authority.

30/ "May we, and should we, establish regulations to ensure that a utility fairly and reasonably allocates capacity?" NPRM ¶ 223.

31/ 77 F.3d 1399 (D.C. Cir. 1996).

32/ Id. at 1403.

33/ Id. at 1404.

34/ Id. at 1406.

However, the Commission will be hard pressed to draft a specific allocation rule that fairly addresses the needs of all concerned parties. Neither the electric utility nor the FCC can know whether a competing telecommunications carrier will spring up in the future with an attachment demand. Neither the electric utility nor the FCC can know whether a presently-existing competing telecommunications carrier may in the future desire to extend its service into a new territory in which another carrier is making a present attachment demand. Given this uncertainty, the Commission should require electric utilities to allocate third-party attachment capacity on a first-come, first-served basis. In order to preclude a telecommunications carrier from impeding competition by warehousing all attachment capacity, carriers holding leased capacity should be required actually to make an attachment within a reasonable period (e.g., six months) if the utility must deny a competitor's attachment request for want of capacity.

### C. Electric Utilities Should Have Wide Latitude To Determine What Constitutes Valid Safety, Reliability, or Generally-Applicable Engineering Purposes Under Section 224(f)(2)

The Commission seeks comments on several issues relating to the statutory exception in Section 224(f)(2) permitting an electric utility to deny access for reasons of safety, reliability, or generally applicable engineering purposes. In particular, the NPRM asks what "specific reasons . . . if any" could justify denial,[35/] whether a "certain minimum or quantifiable threat to reliability" should be required,[36/] and whether the Commission should "establish regulations that

[35/] NPRM ¶ 222.

[36/] NPRM ¶ 223.